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Prior Conviction Impeachment in the District of Columbia: What Happened when the Courts Ran Out of Luck?

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PRIOR CONVICTION IMPEACHMENT IN THE DISTRICT OF COLUMBIA: WHAT HAPPENED WHEN THE COURTS RAN OUT OF *LUCK*?[1]

It has long been recognized that evidence of a criminal defendant's past convictions[2] may not be introduced to establish the defendant's propensity to commit crimes.[3] However, while inadmissible as substantive evidence of guilt, almost all[4] jurisdictions permit the government to use prior convictions to impeach the credibility of an accused who testifies in his own defense.[5] The rationale propounded for this rule is that an individual's willingness to engage in illegal conduct is often translatable into a willingness to commit perjury.[6] It is further urged that the accused should not be able to give the jury the impression he has theretofore led a "blameless" life.[7]

For almost a century, the traditional practice in most jurisdictions was to admit evidence of former convictions for any crimes falling within certain large classes of offenses serving as a basis for impeachment.[8] Critics urged,

1. Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965). *See infra* notes 15-34 and accompanying text.

2. This Note focuses exclusively on prior conviction impeachment of the criminal defendant.

3. Michelson v. United States, 335 U.S. 469, 475-476 (1948); Drew v. United States, 331 F.2d 85, 89 (D.C. Cir. 1964); Fields v. United States, 396 A.2d 522, 527 (D.C. 1978).

4. 4 B. JONES ON EVIDENCE § 26:20 (6th ed. 1972 & Supp. 1985) [hereinafter cited as B. JONES]; C. MCCORMICK, MCCORMICK ON EVIDENCE § 43 (3d ed. 1984) [hereinafter cited as C. MCCORMICK]; 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 980 (Chadbourn Rev. 1970 & Supp. 1985).

5. Evidence relating to an accused's prior convictions may not be offered until the accused has taken the witness stand since the effect of presentation of such evidence would be to compel the defendant to testify. 81 AM. JUR. 2D *Witnesses* § 523 (1976 & Supp. 1985).

6. Clawans v. District of Columbia, 62 F.2d 383, 384 (D.C. Cir. 1932); *see also* Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161, 297 (1969); 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 609[02], 609-54 to 609-55 (1981 & Supp. 1985) [hereinafter cited as 3 J. WEINSTEIN & M. BERGER]; Note, *Protection of Defendants under Federal Rule of Evidence 609(a): Is the Rule an Endangered Species?*, 31 RUTGERS L. REV. 908, 910 (1979).

7. *See* C. MCCORMICK, *supra* note 4, at § 43. Note, *Proposed Rule of Evidence 609: Impeachment of Criminal Defendants by Prior Convictions*, 54 WASH. L. REV. 117, 120-121 (1978).

8. *See* Spector, *Rule 609: A Last Plea for Its Withdrawal*, 32 OKLA. L. REV. 334, 336 (1979); Comment, *Prior Conviction Evidence and Defendant Witnesses*, 53 N.Y.U. L. REV. 1290, 1296 (1978). Traditionally, there has been a wide variation among the states with respect to the categories of offenses serving as a basis for impeachment. *See* C. MCCORMICK,

however, that this mechanical approach placed the criminal defendant in a deplorable dilemma.[9] The defendant choosing to testify faced the risk that, notwithstanding appropriate instructions,[10] the jury would convict him because of his prior criminal record[11] or "bad" nature,[12] rather than on the strength of the evidence adduced at trial. On the other hand, the defendant who refrained from taking the stand risked the possibility that the jury would infer from his silence an inability to deny the charges against him.[13]

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supra note 4, at § 43. Some jurisdictions allowed automatic admission of convictions for any "crime." Others considered relevant any convictions falling within such categories as felonies, "infamous" crimes, and offenses demonstrating "moral turpitude." *See* Note, *Evidence—Admissibility of Prior Convictions to Impeach a Witness,* 44 TENN. L. REV. 401, 402 (1977); Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters,* 70 YALE L.J. 763, 775 (1961).

9. *See* 3 J. WEINSTEIN & M. BERGER, *supra* note 6, ¶ 609[02], at 56-57. *See also* Note, *Limiting the Use of Prior Bad Acts and Convictions to Impeach the Defendant-Witness,* 45 ALB. L. REV. 1099, 1099 (1981); Note, Dixon v. United States: *Prior Conviction Evidence and the Demise of the* Luck *Rule,* 34 U. PITT. L. REV. 67, 72 (1972) [hereinafter cited as Note, *Dixon*]; Note, *Evidence—Impeachment—Admission of Prior Conviction to Impeach Defendant-Witness Violates Constitutional Right to Due Process,* 25 VAND. L. REV. 918, 919-20 (1972) [hereinafter cited as Note, *Admission*].

10. The primary protection afforded to the defendant was the trial judge's limiting instruction to the jury, admonishing it not to consider the defendant's past record as evidence of guilt for the offenses charged, but to use it only in evaluating the defendant's capacity for truthfulness. Note, *Impeachment of the Criminal Defendant by Prior Convictions,* 50 NOTRE DAME LAW. 726, 733 (1975) [hereinafter cited as Note, *Impeachment*]. Courts and commentators alike, however, have seriously questioned the ability of jurors to perform the "mental gymnastic" of restricting the evidence to its permissible purpose. Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932); Note, *The Limiting Instruction—Its Effectiveness and Effect,* 51 MINN. L. REV. 264, 281-88 (1966). Studies have demonstrated that, notwithstanding limiting instructions, there is an increased likelihood that a defendant will be convicted where the jury knows or believes the defendant has a prior criminal record. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 160-62, 177-81 (1966). Moreover, empirical data indicates that the use of a limiting instruction may have the perverse effect of increasing, rather than decreasing the prejudicial effects of prior conviction evidence by focusing the jury's attention on the defendant's prior record. Note, *Constitutional Problems Inherent in the Admissibility of Prior Record Conviction Evidence for the Purpose of Impeaching the Credibility of the Defendant Witness,* 37 U. CIN. L. REV. 168, 172 (1978) [hereinafter cited as Note, *Constitutional*]. *See also* Broeder, *The University of Chicago Project,* 38 NEB. L. REV. 744, 754 (1959). That many defense counsel are aware of the inadequacy of limiting instructions is evidenced by the fact that defendants with criminal records testify far less frequently than do those without such records. *See* Spector, *supra* note 8, at 348.

11. Comment, *Impeachment Through Introduction of Prior Criminal Record—The Pennsylvania Rule v. Federal Rule of Evidence 609(a),* 16 DUQ. L. REV. 73 (1977-78); Note, *Impeachment of the Defendant-Witness by Prior Convictions,* 12 ST. LOUIS U.L.J. 277, 278 (1968).

12. Note, *Impeaching the Accused by his Prior Crimes—A New Approach to an Old Problem,* 19 HASTINGS L.J. 919, 923 (1968).

13. *See* C. MCCORMICK, *supra* note 4, at § 43; Nichol, *Prior Crime Impeachment of Criminal Defendants: A Constitutional Analysis of Rule 609,* 82 W. VA. L. REV. 391, 392 (1980); Note, *Impeachment, supra* note 10, at 732; Note, *Dixon, supra* note 9, at 72; *see also* 3 J. WEINSTEIN & M. BERGER, *supra* note 6, ¶ 609[02], at 609-57.

Moreover, the effect could be to deprive the jury of relevant evidence about the crime charged within the peculiar knowledge of the accused.[14]

In 1965, the United States Court of Appeals for the District of Columbia Circuit attempted to resolve this dilemma with *Luck v. United States.*[15] The decision, which rejected any suggestion that the government was automatically entitled to introduce an accused's criminal record,[16] marks the beginning of the modern era in prior conviction impeachment.[17] The court interpreted a District of Columbia statute[18] as vesting the trial judge with discretion to exclude evidence of a witness' previous convictions whenever the prejudicial effects of such evidence far outweighed its probative value on the issue of credibility.[19] While the court considered a number of factors relevant to such a determination,[20] it urged that the primary consideration should be the extent to which it was "more important to the search for truth . . . for the jury to hear the defendant's story than to know of a prior conviction."[21] The *Luck* decision thus recognized that while prior conviction evidence could have true probative value on the issue of the accused's credibility, it nonetheless should be admitted on a discretionary basis because of the potential for prejudice.[22] In adopting an approach that allowed

14. *See* Spector, *supra* note 8, at 348 n.84.

15. 348 F.2d 763 (D.C. Cir. 1965).

16. *Id.* at 767.

17. *Luck* served as a springboard for federal and state reform of prior conviction rules. *See infra* notes 27-34 and accompanying text; *see also* 3 J. WEINSTEIN & M. BERGER, *supra* note 6, ¶ 609[03], at 60-62.

18. D.C. CODE ANN. § 14-305 (1961) read in pertinent part as follows: "No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime, *but such fact may be given in evidence to affect his credit as a witness,* either upon the cross-examination of the witness or by evidence aliunde . . . ." *Id.* (emphasis added).

19. 348 F.2d at 767-68. The court noted that the statute was written in permissive rather than mandatory terms. *Id.*

20. Those other factors were: (1) the nature of the prior offense; (2) the length of the accused's criminal record; and (3) the circumstances and age of the accused. *Id.* at 769.

21. *Id.* Decisions subsequent to *Luck* set forth certain "rules of thumb" with respect to the application of these criteria. In Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967), *cert. denied,* 390 U.S. 1029 (1968), the court urged first that crimes involving dishonest conduct were probative of a witness' veracity, whereas those of an assaultive or violent nature were not. As a general rule, it maintained, only the former should be admissible. *Id.* at 940. Second, the court noted that prior convictions which were remote in time and followed by a "legally blameless life" should generally be excluded. This rule was applicable even where the conviction was for a crime involving dishonesty. *Id.* Third, the court held that evidence of prior convictions for crimes similar to the conduct for which the defendant is on trial should be admitted only sparingly because of the increased risk that the jury would draw the impermissible inference that commission of the former offenses indicated the accused's guilt for the crimes charged. *Id.* Finally, as in *Luck,* the court emphasized that consideration be given to the importance of the defendant's testimony. *Id.* at 940-41.

22. *Gordon,* 383 F.2d at 939 (discussing the *Luck* rationale).

neither the automatic inclusion nor exclusion of prior conviction evidence, the court accommodated at once two competing interests: the need to provide the jury with as much evidence as is necessary to reach a fair determination and the desire to protect an accused from the abuse of highly prejudicial evidence.[23]

The *Luck* doctrine did not, however, survive long in the jurisdiction of its origin. In 1970, Congress enacted legislation to remove all discretion on the part of local District of Columbia judges to exclude evidence of former felony convictions. Automatic admission of convictions of any misdemeanor involving dishonesty or false statement was also mandated.[24] The statute, now incorporated into section 14-305 of the District of Columbia Code (D.C. Code),[25] represents a congressional determination that, at least in the

23. *Luck*, 348 F.2d at 769; *see also* Curran, *Federal Rule of Evidence 609(a)*, 49 TEMP. L.Q. 890, 891 (1976); Note, *supra* note 7, at 119-21; Note, *Impeachment Under 609(a): Suggestions for Confining and Guiding Trial Court Discretion*, 71 NW. U.L. REV. 655, 666-67 (1976) [hereinafter cited as Note, *Suggestions*].

24. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 133, 84 Stat. 550-51 (1970) (codified at D.C. CODE ANN. § 14-305(b) (1981 & Supp. IV 1986)). The term "dishonesty or false statement" has been broadly construed to encompass all crimes not involving passion or short temper. Hampton v. United States, 340 A.2d 813, 816-17 (D.C. 1975). Even narcotics offenses fall within the § 14-305 definition of dishonesty. Durant v. United States, 292 A.2d 157, 160 (D.C. 1972), *cert. denied*, 409 U.S. 1127 (1973). For a list of the many offenses qualifying for admission as crimes of dishonesty/false statement, see H.R. REP. NO. 907, 91st Cong., 2d Sess. 62 (1970). *Cf.* FED. R. EVID. 609, *infra* note 31 and accompanying text.

25. D.C. CODE ANN. § 14-305 (1981 & Supp. IV 1986). Section 14-305 reads in full as follows:

> (a) No person is incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of a criminal offense.
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> (b)(1) Except as provided in paragraph (2), for the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a criminal offense shall be admitted if offered, either upon the cross-examination of the witness or by evidence aliunde, but only if the criminal offense (A) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (B) involved dishonesty or false statement (regardless of punishment). A party establishing conviction by means of cross-examination shall not be bound by the witness' answers as to matters relating to the conviction.
>
> (2)(A) Evidence of a conviction of a witness is inadmissible under this section if—
> (i) the conviction has been the subject of a pardon, annulment, or other equivalent procedure granted or issued on the basis of innocence, or
> (ii) the conviction has been the subject of a certificate of rehabilitation or its equivalent and such witness has not been convicted of a subsequent criminal offense.
> (B) In addition, no evidence of any conviction of a witness is admissible under this section if a period of more than ten years has elapsed since the later of (i) the date of the release of the witness from confinement imposed for his most recent conviction of any criminal offense, or (ii) the expiration of the period of his parole, probation or sentence granted or imposed with respect to his most recent conviction of any criminal offense.

District of Columbia, the probative value of prior convictions always outweighs the potential prejudice to the defendant.[26]

Despite its demise in the District of Columbia, the *Luck* decision had far-reaching influence. Within a few short years, most federal circuits had judicially adopted its approach to assess the admissibility of prior convictions.[27] Federal Rule of Evidence 609,[28] adopted by Congress in 1975 to govern

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(c) For purposes of this section, to prove conviction of crime, it is not necessary to produce the whole record of the proceedings containing the conviction, but the certificate, under seal, of the clerk of the court wherein the proceedings were had, stating the fact of the conviction and for what cause, shall be sufficient.

(d) The pendency of an appeal from a conviction does not render evidence of that conviction inadmissible under this section. Evidence of the pendency of such an appeal is admissible.

Id.

26. Hill v. United States, 434 A.2d 422, 429 (D.C. 1981), *cert. denied,* 454 U.S. 1151 (1983). *See also* Sweet v. United States, 449 A.2d 315, 317 n.1 (D.C. 1982). *Compare* § 14-305's assumption of admissibility *with* FED. R. EVID. 609. The legislative history reveals several reasons for Congress' actions. First, some were concerned that the doctrine was vague and robbed jurors of a valuable tool in assessing witness credibility. S. REP. NO. 538, 91st Cong., 1st Sess. 4 (1969); H.R. REP. NO. 907, 91st Cong., 2d Sess. 63 (1970). Second, Congress wanted to bring the District of Columbia courts back into line with the law then prevailing in the vast majority of states. S. REP. NO. 538, at 4; H.R. REP. NO. 907, at 62. Finally, the draft rule proposed at that time for the federal courts by the Advisory Committee was similar. S. REP. NO. 538, at 4. *But see infra* notes 28-30 and accompanying text. The conference measure assumed § 14-305 would be amended in the event the rule subsequently adopted for the federal courts differed. H.R. REP. NO. 1303, 91st Cong., 2d Sess. 231 (1970) (conf. rep.).

Despite the absence of judicial discretion, the statute has, on several occasions, successfully withstood constitutional challenges. Dixon v. United States, 287 A.2d 89, 93-96 (D.C.), *cert. denied,* 407 U.S. 926 (1972) (no violation of due process or right to trial by impartial jury); *see also* Davis v. United States, 313 A.2d 884, 885 (D.C. 1974); *Hill,* 434 A.2d at 428-29. The United States Supreme Court has also upheld the use of prior conviction evidence. *See, e.g.,* Spencer v. Texas, 385 U.S. 554, 562 (1967) (The "conceded possibility of prejudice is believed to be outweighed by the validity of the state's purpose in permitting introduction of the [prior conviction] evidence."). *But see* State v. Santiago, 53 Hawaii 254, 259-60, 492 P.2d 657, 661 (1971) (prior conviction impeachment violates due process and accused's right to testify in his own defense); Nichol, *supra* note 13, at 409-21; Note, *Dixon, supra* note 9, at 70-78; Note, *Admission, supra* note 9, at 921-24; Note, *Constitutional, supra* note 10, at 178-85.

27. *See* Spector, *supra* note 8, at 338. *See, e.g.,* United States v. Greenberg, 419 F.2d 808, 809 (3d Cir. 1969); United States v. Allison, 414 F.2d 407, 411-12 (9th Cir.), *cert. denied,* 396 U.S. 968 (1969); *see also* 3 J. WEINSTEIN & M. BERGER, *supra* note 6, ¶ 609[03], at 609-60 to 609-62.

28. FED. R. EVID. 609. Rule 609 reads in pertinent part:

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a

prior conviction impeachment in the federal courts, had its genesis in[29] and bears some similarity to the *Luck* doctrine.[30] Unlike its predecessor, rule 609 mandates admission of convictions of any crimes involving an element of dishonesty or false statement, whether felony or misdemeanor, because of their particular relevance to the accused's capacity for truthfulness.[31] With

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period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

Id.

29. *See* Note, *supra* note 6, at 915-22; Surratt, *Prior-Conviction Impeachment Under the Federal Rules of Evidence: A Suggested Approach to Applying the "Balancing" Provision of Rule 609(a),* 31 SYRACUSE L. REV. 907, 914-20 (1980); *see also* J. WEINSTEIN & M. BERGER, *supra* note 6, ¶¶ 609[03], at 609-60 to 609-62; 609[04], at 609-69, 609-76 to 609-77.

30. *See* 3 J. WEINSTEIN & M. BERGER, *supra* note 6, ¶ 609[03], at 609-62. There are several significant differences between rule 609 and the *Luck* doctrine in addition to those described in the text. The *Luck* discretionary doctrine applied to all witnesses, prosecution and defense alike. Davis v. United States, 409 F.2d 453, 456-57 (D.C. Cir. 1969). Rule 609's discretionary balance, on the other hand, applies only to protect the defendant against the prejudicial effects of prior conviction evidence. *See, e.g.,* United States v Nevitt, 563 F.2d 406, 408-09 (9th Cir. 1977), *cert. denied,* 444 U.S. 847 (1979); S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL, RULE 609, at 520 (4th ed. 1986). Under *Luck,* the defendant had the burden of proving that the prejudicial effect of the prior conviction evidence far outweighed its probative value. Evans v. United States, 397 F.2d 675, 679 (D.C. Cir 1968), *cert. denied,* 394 U.S. 907 (1969). However, under rule 609, it is the government's burden to demonstrate that the probative value exceeds its prejudicial impact with respect to non-crimen falsi offenses. United States v. Mahone, 537 F.2d 922, 929 (7th Cir.), *cert. denied,* 429 U.S. 1025 (1976); *see also* Surratt, *supra* note 29, at 923-24; Comment, *Prior Conviction Evidence and Defendant Witnesses,* 53 N.Y.U. L. REV. 1290, 1299-1301 (1978). For a history of the development of Federal Rule 609, see 3 J. WEINSTEIN & M. BERGER, *supra* note 6, at 609-3 to 609-42.

31. FED. R. EVID. 609(a)(2). *See also* 3 J. WEINSTEIN & M. BERGER, *supra* note 6, ¶ 609[04], at 609-69 to 609-70. While rule 609(a)(2) and § 14-305(b)(1)(B) of the D.C. Code contain identical language requiring admission of crimes involving "dishonesty or false statement," the legislative history to rule 609 indicates that Congress intended the term be interpreted in a far more restrictive manner than that for § 14-305. *See supra* note 24 and accompanying text. The Conference Committee explained:

By the phrase "dishonesty or false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or

respect to nonfalsity related felonies, however, a *Luck*-type approach is used. The federal courts must admit evidence of such a conviction only upon a finding that its probative value exceeds the likely prejudicial effects to the defendant.[32] Within the past decade, a majority of states have also abrogated the rule of automatic admissibility and have instead adopted a discretionary balancing approach similar to that under federal rule 609.[33] Both the federal and state courts continue to consider the *Luck* factors relevant today in determining whether to admit evidence of prior convictions.[34]

It is somewhat ironic that the District of Columbia, once a forerunner in evidentiary reform, now belongs to a minority that is growing ever smaller. While section 14-305 was enacted by Congress on the assumption that the measure would be reconsidered if the rule adopted for the federal courts differed, Congress nonetheless has failed to take any action.[35] Moreover, although the District of Columbia Council has been empowered since 1973

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false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

H.R. REP. NO. 1597, 93d Cong., 2d Sess. 9 (1974) (conf. rep.), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7098, 7102-03. As such, rule 609 requires that the evidence have a much stronger nexus to veracity than the District of Columbia rule.

32. FED. R. EVID. 609(a)(1).

33. *See* B. JONES, *supra* note 4, at § 26:20; *see generally* 3 J. WEINSTEIN & M. BERGER, *supra* note 6, ¶ 609[12], at 609-109 to 609-138; J. WIGMORE, *supra* note 4, at § 987. Most states follow the federal rule and mandate admissibility of prior convictions for crimes involving dishonesty or false statement, but reserve judicial discretion to exclude evidence relating to non-crimen falsi felonies. *See* 3 J. WEINSTEIN & M. BERGER, *supra* note 6, ¶ 609[12] at 609-109 to 609-139. A substantial number require a balancing of prejudicial effect against probative worth not only for felonies, but for crimen falsi offenses. *Id.* Still others have limited substantially the type of crime the conviction of which may serve as the basis for impeachment. For instance, some admit only crimen falsi convictions and then only after it has been determined probative value outweighs prejudicial effect. *Id.* A tiny minority prohibits any use of prior conviction evidence against the defendant. *See, e.g.*, MONT. REV. CODES ANN. § 93-3002 RULES OF EVIDENCE, 609 (1977).

34. *See, e.g.*, United States v. Jackson, 627 F.2d 1198, 1209 (D.C. Cir. 1980); United States v. Hawley, 554 F.2d 50, 53 n.5 (2d Cir. 1977); People v. Crawford, 83 Mich. App. 35, 39, 268 N.W.2d 275, 276 (1978); State v. Gardner, 139 Vt. 456, 458, 433 A.2d 249, 251-52 (1981); *see also* 3 J. WEINSTEIN &. M. BERGER, *supra* note 6, ¶ 609[04], at 609-77 to 609-78.

35. *See supra* note 26. While home rule was to a large degree restored to the District of Columbia under the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) [hereinafter cited as the Home Rule Act], Congress retains the right to exercise its constitutional authority as the legislature of the District of Columbia. U.S. CONST. art. I, § 8, cl. 17; Home Rule Act, § 601, 87 Stat. at 813 (codified at D.C. CODE ANN. § 1-206 (1981 & Supp. II 1985)). Congress has, in addition, expressly set forth nine areas in which the District of Columbia Council may not legislate. Home Rule Act, § 602(a), 87 Stat. at 813-14 (codified at D.C. CODE ANN. § 1-233(a)). Moreover, Congress continues to play an important role in the local legislative process even where the Council is empowered to act. Generally, legislation approved by the Council does not take effect until after it has been transmitted to Congress and Congress fails to disapprove the measure by

to legislate over local matters,[36] it has not attempted to amend the prior conviction rule. Dual evidentiary standards therefore prevail in the local and federal court systems within the District.[37] As a result, there may well be a disparity in the trial outcomes of defendants charged in either system for the violation of identical D.C. Code offenses, a notion offensive to principles of fairness, uniformity, and equal protection under law.[38]

Notwithstanding the congressional mandate that all prior convictions falling within the purview of section 14-305 must be admitted for the purpose of impeachment, the local courts of the District of Columbia have placed re-

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concurrent resolution within 30 "legislative" days. Home Rule Act, § 602(c)(1), 87 Stat. at 814 (codified at D.C. CODE ANN. § 1-233(c)(1)).

36. Home Rule Act, § 404, 87 Stat. at 787 (codified at D.C. CODE ANN. § 1-227). The Council's authority to amend § 14-305 is not entirely free from doubt. Section 718(a) of the Home Rule Act requires local District of Columbia courts to "continue as provided under the District of Columbia Court Reorganization Act of 1970." Home Rule Act, § 718, 87 Stat. at 820 (codified at D.C. CODE ANN. tit. 11, app. at 624). Although § 14-305's prior conviction rule was enacted as a part of the 1970 court reorganization measure, *see supra* note 24, it is highly unlikely that § 718 may be considered a bar to Council amendment of § 14-305. First, it is probable that § 718 was intended only to prevent interference with the organization and jurisdiction of the local courts. Section 718 references another provision of the Home Rule Act, § 602(a)(4), which prohibits Council action with respect to any provision of "title 11 of the District of Columbia Code (relating to organization and jurisdiction of the District of Columbia Courts)." Home Rule Act, § 602(a)(4), 87 Stat. at 813 (codified at D.C. CODE ANN. § 1-233(a)(4) (formerly § 1-147(a)(4)). This reference, as well as the placement of § 718 within the appendix to title 11 of the D.C. Code, indicates that § 718 merely reinforces the title 11 prohibition. Second, the Home Rule Act's legislative history, as well as its language, suggests that Congress' principal concern was to ensure that recently approved changes in the structure of the local courts were carried out. *See* District of Columbia v. Sullivan, 436 A.2d 364, 366 (D.C. 1981). *See generally* H.R. REP. NO. 703, 93d Cong., 1st Sess. 77-78 (1973) (conf. rep.). Finally, while not conclusive, it is noteworthy that the District of Columbia Council has, without adverse congressional reaction, deviated from other provisions of the 1970 Court Reorganization Act dealing with evidentiary matters. Significantly, the Council has on two occasions amended § 14-307 of the D.C. Code relating to physician testimony. D.C. Law 2-292, § 805(b), 25 D.C. Reg. 5055 (1978) and D.C. Law 5-258, § 7, 32 D.C. Reg. 1010 (1985). While historically there has been some controversy over the limits of the Council's authority to promulgate rules of evidence, within or without the context of the Court Reorganization Act, *see* McKay, *Separation of Powers in the District of Columbia Under Home Rule*, 27 CATH. U.L. REV. 515, 534-38 (1978), the Council has not been daunted. *See, e.g.*, D.C. Law 5-204, § 2(b), 31 D.C. Reg. 5977 (1985) (amending D.C. CODE ANN. § 23-114 to dispense with the requirement that the testimony of a child victim be independently corroborated).

37. The United States Court of Appeals for the District of Columbia Circuit has held that § 14-305 does not apply in the combined trial of U.S. Code and D.C. Code offenses in federal court. United States v. Belt, 514 F.2d 837, 844 (D.C. Cir. 1975) (law of the forum controls); *see also* United States v. Hairston, 495 F.2d 1046, 1054 n.13 (D.C. Cir. 1974) (law of the forum controls).

38. *See generally* Note, *Federal and Local Jurisdiction in the District of Columbia*, 92 YALE L.J. 292, 318-21 (1982).

strictions on the manner[39] in which the government may cross-examine the criminal defendant about his former convictions.[40] The aim of these restrictions is to ensure that prior convictions are in fact used for the statutorily authorized purpose of testing the defendant's capacity for truthfulness and not to establish his guilt for the offenses with which he is charged at trial.[41] *Dorman v. United States,*[42] decided in 1984 by the District of Columbia Court of Appeals sitting en banc, is the most recent expression of the law in this area. In *Dorman,* the appellant had been convicted in the District of Columbia Superior Court for petit larceny of a radio.[43] Judge Belson, writing for the majority, found that a particular sequence of the prosecutor's questions[44] during cross-examination of the appellant had impermissibly im-

39. For limitations on the *scope* of the government's cross-examination into the criminal defendant's prior convictions, see Ward v. United States, 386 A.2d 1180, 1182 (D.C. 1978) (while fact of prior conviction is admissible, details of the crimes for which the defendant was formerly convicted are inadmissible unless "independently relevant" to the issues at trial).

40. *See* Dorman v. United States, 491 A.2d 455, 458-59 (D.C. 1984); *see generally* Baptist v. United States, 466 A.2d 452 (D.C. 1983); Bailey v. United States, 447 A.2d 779 (D.C. 1982); Fields v. United States, 396 A.2d 522 (D.C. 1978).

41. *Dorman,* 491 A.2d at 458, 460.

42. 491 A.2d 455 (D.C. 1984). The court, in granting rehearing en banc, vacated the decision of a panel of the court affirming the appellant's conviction. *Id.* at 459.

43. *Id.* at 462.

44. The prosecutor's cross-examination and the appellant's responses thereto were as follows:

Q. Mr. Dorman, you are saying when Officer Green said he saw you go up to Sergeant Hickey on the steps, he is not telling the truth, is that right?

A. Yes sir.

[The court overrules defense counsel's objection.]

Q. Is that correct?

A. Yes, sir.

Q. And when Officer Green said that he saw you take that radio from Sergeant Hickey, he was again not telling you the truth, is that correct?

A. Yes, sir.

Q. And when Officer Green said that he saw you walk away with that radio, he was again not telling the truth?

A. Yes, sir.

Q. And that when he said that you got 90 feet from Sergeant Hickey he was again not telling the truth?

A. Yes, sir.

Q. So essentially his entire testimony was just not true, is that right?

A. Yes, sir.

Q. And when Sergeant Hickey said that he saw you ten feet from him holding the radio, again, he was not telling the truth either, was he?

A. Yes, sir.

Q. He wasn't?

A. Right.

Q. *So you never touched the radio, is that right?*

A. Yes, sir.

Q. *You just walked up to it, looked at it, walked down two steps and you weren't*

plied to the jury that, because appellant had previously been convicted of attempted larceny and other crimes, he was guilty of the charged offense of petit larceny.[45] He reasoned, however, that the error did not warrant reversal in light of the strength of the evidence against the appellant and because appropriate limiting instructions to the jury were issued at trial.[46] Four members of the court concurred in the result attained by the majority, but dissented from its finding of error.[47] Several members urged that the majority's decision was incompatible with congressional intent under section 14-305 of the District of Columbia Code.[48]

This Note traces the historical development of judicial limitations on the government's ability to conduct prior conviction impeachment in an effort to determine their efficacy. By examining legal developments in the District of Columbia, the Note illustrates the *Dorman* decision's incompatibility with established precedent. However, it also demonstrates that the *Dorman* innovations were necessary, from a public policy standpoint, to provide the accused with even a modicum of protection against juror misuse of criminal record evidence. Finally, the Note, concluding that the existing limitations are an inadequate substitute for judicial discretion to exclude such evidence, recommends that a rule identical to Federal Rule of Evidence 609 be adopted for the District of Columbia courts.

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even touching it and all of these policemen arrested you for no reason at all, is that correct?

A. Yes, sir.

Q. Now Mr. Dorman, are you the same Lawrence Dorman that on December 21, 1973, was convicted of first degree burglary?

A. Yes, sir.

Q. And are you the same Lawrence Dorman that on the same date was convicted of attempted larceny?

A. Yes, sir.

Q. And are you the same Lawrence Dorman that on March 22, 1974, was convicted of assault with a deadly weapon, a gun?

A. Yes, sir.

Q. And are you the same Lawrence Dorman that on November 9th, 1971, was convicted of carrying a dangerous weapon, a gun?

A. Yes, sir.

Id. at 462-63 (emphasis added).

45. *Id.* at 464.

46. *Id.*

47. 491 A.2d at 464 (Pryor, C.J., dissenting); *id.* at 468-76 (Gallagher, J. dissenting, joined by Nebeker & Kern, JJ.); *id.* at 464-68 (Nebeker, J., dissenting); *id.* at 476-77 (Kern, J., dissenting).

48. *Id.* at 465-66 (Nebeker, J., dissenting); *id.* at 473-74 (Gallagher, Nebeker & Kern, JJ., dissenting).

I. AN HISTORICAL PERSPECTIVE: WHEN THE PAST SHALL NOT BE PROLOGUE

Fields v. United Statess[49] represents the District of Columbia Court of Appeals' first effort to regulate the manner in which prior conviction impeachment of a criminal defendant may be conducted. In *Fields,* the court reversed the appellant's conviction for several armed offenses because the government, at trial, had asked the appellant questions regarding his former convictions for weapons offenses immediately after asking questions eliciting his denial that he had possessed a weapon on the night of the offenses in question.[50] This sequence, the court found, was impermissibly "designed to suggest to the jury" that because appellant had previously carried a weapon he was guilty of the armed offenses charged.[51] The court noted that the risk that the jury would be unable to restrict its use of the prior conviction to the permissible purpose of impeachment was greatest when, as in the case at

49. 396 A.2d 522 (D.C. 1978).

50. *Id.* at 527-28. The challenged cross-examination was as follows:

Q. *Now, Mr. Fields, you had a gun with you that night; didn't you?*

A. No, sir.

Q. *Are you the same Jesse Fields that was convicted in 1969 of carrying a pistol without a license?*

A. I'm the Jesse Fields that pleaded guilty to that charge.

Q. Well, did you plead guilty because you were guilty?

A. Yes, sir.

[The court issued a limiting instruction.]

Q. *Did you have a gun with you that night?*

A. No.

Q. *Are you the same Jesse Fields that was convicted of unregistered possession of a firearm?*

A. I'm the same Jesse Fields that stepped forward and pled guilty.

[The court issued a limiting instruction.]

Q. *Was that in 1975 that you were convicted of that second weapons offense?*

A. Yes, sir, I think it was. I think it was the same year.

Id. at 526-27 (emphasis added).

51. *Id.* at 528. The court, in finding error, adopted the rationale of two nonbinding federal decisions, United States v. Henry, 528 F.2d 661 (D.C. Cir. 1976) and United States v. Carter, 482 F.2d 738 (D.C. Cir. 1973). 396 A.2d at 527-28. In *Carter,* the defendant's conviction was reversed where, on cross-examination, the prosecutor impeached the defendant with prior convictions for robbery and for assault immediately after the defendant had denied committing the robbery offense charged. Such questioning, the court held, was "designed effectively to persuade the jury" that the defendant's former convictions indicated his guilt for the offense charged. 482 F.2d at 740-41. In *Henry,* the court reversed the defendant's convictions for several narcotics offenses in violation of the U.S. and D.C. Codes. The crucial issue in the case had been whether the defendant or another individual had possessed certain contraband. Directly after denying he had supplied the individual with contraband, the defendant was impeached with various narcotics convictions. 528 F.2d at 667. The court found that the juxtaposition of the questions impermissibly "invited the jury" to consider the former convictions as evidence that the defendant was guilty of the offenses charged. *Id.* at 667-68.

hand, the conviction utilized to impeach the defendant was for a crime similar to that charged.[52] Finally, the court concluded that the trial judge's issuance of several cautionary instructions could not have cured the "highly suggestive and prejudicial" effect of the sequence.[53] In essence, it found that the questioning constituted plain error.[54]

Only a few years later, in 1982, the District of Columbia Court of Appeals, in *Bailey v. United States,*[55] once again found that the government's manner of prior conviction impeachment constituted error.[56] At trial for assault with intent to rape, the government impeached Bailey with a prior conviction for armed rape immediately after the prosecutor had elicited his denial of guilt for the charged offense.[57] On appeal, the court held that the questioning was impermissibly designed to suggest to the jury that because appellant had raped on a prior occasion, he had attempted to do so on the night in question.[58] The court noted the increased likelihood of prejudice to the appellant because of the similarity between the prior conviction used to

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52. 396 A.2d at 527.

53. *Id.* at 528.

54. *Id. See also Carter,* 482 F.2d at 740-41 (cautionary instructions inadequate to cure prejudice); *Henry,* 528 F.2d at 668 (cautionary instructions inadequate to cure prejudice).

55. 447 A.2d 779 (D.C. 1982).

56. *Id.* at 783.

57. *Id.* at 781. The cross-examination sequence challenged by appellant consisted of the following:

> Q. Mr. Bailey, isn't it true that you went out with that woman who was not your wife because you wanted some sexual gratification, isn't that true?
>
> A. No, it is not.
>
> Q. And isn't that true that that entire night you talked about that necklace around your throat to eventually get her into a strange place to rape her?
>
> [A pause in the proceedings.]
>
> Q. Just wasn't you at all. You didn't walk together off the bus over to 1903-15th Street?
>
> A. No, we did not.
>
> Q. You didn't walk into the hallway of that building at all?
>
> A. No, I didn't.
>
> Q. You didn't drag her, lead her down the first flight and drag her into the second flight?
>
> A. No, I didn't.
>
> Q. *That didn't happen. You didn't try to rape her down there, is that right?*
>
> A. That's correct.
>
> Q. *Are you the same Phillip Bailey who on May 14th, 1971, was convicted in the United States District Court for the District of Columbia of armed rape?*
>
> A. Yes, I am.

Id. (emphasis added).

58. *Id.* at 782-83. The *Bailey* court rejected efforts on the part of the government to distinguish *Fields* on the ground that the prosecutor had paused immediately before questioning the appellant as to his prior convictions. The court reasoned that the pause could arguably have served to increase rather than to diminish the prejudicial effect of the questioning. *Id.*

impeach him and the charged offense.[59] As in *Fields,* the court found that the questioning constituted plain error, incurable by any cautionary instructions to the jury on the limited use of prior conviction evidence.[60]

Decisions issued subsequent to *Fields* and *Bailey* have rejected claims that the government improperly conducted its prior conviction cross-examination of the defendant.[61] In *Baptist v. United States,*[62] the appellant had been convicted in the court below of attempted burglary and attempted petit larceny in connection with his entering into a freight car and handling certain boxes contained therein.[63] In the challenged sequence of questioning,[64] the government impeached the appellant with a prior conviction for attempted petit larceny immediately after a question eliciting his denial that he had "stack[ed] up" certain boxes in the freight car.[65] The court found no *Bailey* violation in that the prior conviction impeachment did not immediately follow a general denial by the appellant of the offense charged.[66] Neither, the court concluded, was there any *Fields* violation as the impeachment did not

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59. *Id.* at 782.

60. *Id.* at 783.

61. Reed v. United States, 485 A.2d 613, 617 (D.C. 1984) (*Bailey* does not preclude prosecution from opening cross-examination of the accused with prior convictions for a similar offense simply because the accused had, at the conclusion of direct examination, generally denied his guilt for the charged offense). *See infra* notes 62-70 and accompanying text.

62. 466 A.2d 452 (D.C. App. 1983). *Baptist* was issued shortly before vacation of the *Dorman* panel decision. *Id.* at 456. *See supra* note 42.

63. 466 A.2d at 453-54.

64. The appellant challenged three sequences of cross-examination. The court summarily rejected challenges to two of the sequences. *See id.* at 454, 458. The prior conviction sequence addressed by the court consisted of the following:

> Q. Mr. Baptist, when you found the fourth box car, you opened it up and you found those small boxes of canned food, you felt pretty lucky; didn't you?
>
> A. If you mean the fourth box car in question, which was the first box I got into, then my contention is I wasn't trying to steal anything.
>
> Q. That is the best you can answer the question?
>
> A. That is the best I can answer the question.
>
> Q. How do you explain the fact that you took down four of the boxes and stacked them up by the door of the box car?
>
> A. Pardon?
>
> Q. *How is it that you explain—can you explain to this jury why you stacked up four of the boxes next to the door of the box car?*
>
> A. I didn't stack up four boxes near the door of the box car. I only picked up one box and turned it around to see what it was.
>
> Q. *Mr. Baptist, are you the same Alvin Baptist who, on May fifth, 1980, before the Superior Court of the District of Columbia, was convicted of attempted petit larceny?*

Id. at 458 (emphasis added).

65. *Id.*

66. *Id.*

follow appellant's denial of a key element of the offense charged.[67] Rather, it found that the questions leading up to the prior conviction impeachment related to the "details" or "circumstances surrounding commission of the alleged offenses."[68] Applying a modification of the previously enunciated standard, the court held that the questioning could not have been "intended only to suggest" that the appellant's prior conviction for attempted petit larceny was indicative of his guilt for the same charged offense.[69] It therefore did not constitute error.[70]

II. *DORMAN V. UNITED STATES*: DIFFERING PHILOSOPHIES, DIVERGENT APPROACHES

In *Dorman,* the court attempted not only to resolve the case before it, but to "clarif[y]" prior decisional law,[71] and to articulate standards by which future instances of criminal record impeachment were to be governed. Judge Belson, writing for the majority, urged that henceforth the standard for determining if the government had overstepped its bounds would be whether reasonable jurors would "naturally and necessarily regard the manner in which the impeachment is accomplished as implying that the defendant is guilty of the crime charged because he was guilty of past crimes."[72] Portions of the challenged sequence of questioning, he maintained, would necessarily have led jurors to conclude that because Dorman was formerly convicted of attempted petit larceny and other crimes he was guilty of the charged offense of petit larceny.[73] Judge Belson acknowledged that the bulk of the sequence antecedent to the government's impeachment was intended to test the appellant's credibility, and, hence, would have been an appropriate context in which to conduct the impeachment.[74] However, he maintained that the final

67. *Id.* at 458-59. The court also emphasized that the prosecutor had actually foregone an opportunity to impeach the appellant after he denied any attempt to steal. *Id.*

68. *Id.* at 459. The court had earlier noted that the *Fields* prohibition did not extend to the pairing of questions regarding prior convictions for offenses similar to that charged with mere "testimony that relates to one or more elements of the offense charged." *Id.* at 458.

69. *Id.* (enunciation of test); *id.* at 458-59 (application of test).

70. *Id.* at 459. Judicial decisions of the District of Columbia courts have also held that the rationale of *Fields* and progeny applies to preclude prosecutorial comment upon an accused's prior convictions which "suggests" or "invit[es] the jury" to infer an accused's guilt for the offense charged from the evidence of his former convictions. Ford v. United States, 487 A.2d 580, 591 (D.C. 1984); Dyson v. United States, 450 A.2d 432, 441 (D.C. 1982). As in *Fields,* an error, once found, has generally been considered incurable by instruction. *See, e.g., Dyson,* 450 A.2d at 442.

71. *Dorman,* 491 A.2d at 458 n.1.

72. *Id.* at 460.

73. *Id.* at 464.

74. *Id.* at 463.

two questions preceding impeachment[75] violated the *Fields* and *Bailey* proscriptions.[76] The first of these two questions, he found, elicited a denial by appellant that he had "touched" the radio.[77] While pointing out that technically "taking" rather than "touching" was a key element of larceny, Judge Belson reasoned that a jury would have been unable to make such a fine distinction where the evidence showed that the appellant had picked up and walked away with the radio.[78] He further maintained that the second question, which he characterized as being the prosecutor's summary of the appellant's account of the incident, "predictably" yielded what was, "in effect," a general denial by the appellant of guilt for the offense charged.[79] As such, he concluded, the juxtaposition of these two questions with questions about the appellant's prior convictions for offenses similar to that charged constituted error.[80] Judge Belson concluded, however, that the error did not require reversal. Not only was the error less "flagrant" than those in *Fields* and *Bailey,*[81] but the evidence against the appellant was "overwhelming" and the trial judge had issued repeated limiting instructions to the jury.[82]

Four members of the court dissented from the majority's finding of er-

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75. The last two questions found objectionable by the majority are italicized, *supra* note 44.

76. 491 A.2d at 463-64.

77. *Id.* at 463.

78. *Id.* at 463-64. The court had earlier acknowledged the difficulty in applying *Fields* because a defendant's answer may imply a denial of an element of the offense and because what constitutes a key element may vary according to the facts in each case. *See id.* at 459 & n.2.

79. *Id.* at 464.

80. *Id.*

81. *Id.* at 461-62.

82. *Id.* at 464. The court held that an additional consideration should be whether the defendant's exercise of his right to bring out prior convictions on direct examination, Kitt v. United States, 379 A.2d 973, 975 (D.C. 1977), reduced the prejudicial effects of the evidence. 491 A.2d at 463 n.10. However, it failed to apply this factor in the case at hand. *Id.* at 464. The defendant may exercise his *Kitt* right as a tactical maneuver to reduce the "sting" of prior conviction evidence. *See id.* at 469 (Gallagher, Nebeker & Kern, JJ., dissenting). By not waiting until the government brings up his former convictions, the defendant hopes to avoid the appearance that he is seeking to conceal his prior misdeeds from the jury. It is arguable, however, whether exercise of the *Kitt* right has any substantial mitigating effects. In fact, as in the case of limiting instructions, *see supra* note 10, it may well serve to focus attention on the convictions, creating a greater risk that unfair prejudice will be engendered.

Because the appellant in *Dorman* had failed to object to the cross-examination at trial, the court applied a plain error analysis. 491 A.2d at 464 (test is whether error " 'jeopordize[d] the very fairness and integrity of the trial' " (quoting Watts v. United States, 362 A.2d 706, 709 (D.C. 1976) (en banc)). However, even had the appellant objected, the court would have affirmed under a harmless error analysis. 491 A.2d at 461, 464 (test is whether the court can say " 'fair assurance . . . that the judgment was not substantially swayed by error' " (quoting Kotteakos v. United States, 328 U.S. 750, 765 (1946)).

ror.[83] They viewed the entire sequence preceding the government's impeachment as testing the appellant's capacity for truthfulness. The questions found objectionable by the majority, they maintained, did not provoke denials of guilt on the part of the appellant, but instead elicited a mere affirmation by the appellant that the prosecutor's questions had accurately summarized the appellant's own incredible version of the incident.[84] As such, their juxtaposition with prior conviction impeachment was not improper. Moreover, the dissenters also reasoned that there had been no error because the appellant had himself, on direct and redirect examination, brought out some of his prior convictions, thereby entitling the prosecutor's questioning,[85] and the appellant had been protected adequately against misuse of prior conviction evidence through the judge's repeated issuance of cautionary instructions.[86]

Several dissenters objected to the standard approved by the majority to test the propriety of prior conviction questioning, finding that its vagueness would make it extremely difficult for the participants in a criminal trial to know with any certainty how and when to proceed with or object to impeachment cross-examination.[87] They further observed that the standard's focus on mere "implications" of guilt would likely invalidate even routine cross-examination on prior convictions, in direct contravention of the mandates of section 14-305 and the congressional intent underlying it.[88]

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83. *See supra* note 47.

84. 491 A.d at 470, 476 (Gallagher, Nebeker & Kern, JJ., dissenting). Chief Judge Pryor urged that the questioning was permissible but did not offer a detailed explanation of his views. *Id.* at 464 (Pryor, C.J., dissenting). The dissenters were especially critical of the majority's "hair-splitting" distinctions between impermissible element questioning in advance of impeachment and permissible credibility questioning, *id.* at 466-67 (Nebeker, J., dissenting), and objected to the majority's having "divined" the probable reaction of the jury to the question regarding the "touch[ing]" of the radio. *Id.* at 470 (Gallagher, Nebeker & Kern, JJ., dissenting).

85. *Id.* at 476. The dissenters noted, however, that this did not give a license to the prosecutor to abuse prior conviction evidence. *Id.* at 476 n.10. *See also id.* at 477 (Kern, J., dissenting). The vacated panel decision, written by Judge Gallagher, also emphasized this factor. *See Dorman,* 460 A.2d at 988-89, 991-92.

86. 491 A.2d at 477 (Kern, J., dissenting); *see also id.* at 464 (Nebeker, J., dissenting).

87. 491 A.2d at 475-76 (Gallagher, Kern & Nebeker, JJ., dissenting); *see also id.* at 465-66 (Nebeker, J., dissenting) (majority's decision requires prosecutor to develop skills in diversionary tactics). It should be noted that while Judge Kern joined in the Gallagher dissent, he specially concurred in the adoption of this standard. *Id.* at 477 (Kern, J., dissenting). Chief Judge Pryor concurred with the majority's standard without elaboration. *Id.* at 464 (Pryor, C.J., dissenting).

88. *Id.* at 473-74 (Gallagher, Nebeker & Kern, JJ., dissenting); *see also id.* at 466 & n.6 (Nebeker, J., dissenting). One member stressed that "[s]ince the dawn of prior conviction impeachment, Congress has determined that the inescapable propensity prejudice [from prior conviction use], cured by an immediate instruction, is outweighed by credibility probativeness." *Id.* at 465 (Nebeker, J., dissenting).

III. THE *DORMAN* COURT'S DEPARTURE FROM PRIOR LAW: LAUDABLE AIMS, INADEQUATE MEANS

Dorman represents a significant departure from the court's traditional approach not only in assessing whether the prosecutor's method of conducting prior conviction impeachment is improper, but in determining whether an error, once found, warrants reversal of a defendant's conviction. The majority's finding of error in *Dorman* was the result of its willingness to depart from prior law in three principle ways. First, with respect to the overall standard utilized to gauge the impropriety of prior conviction impeachment, the *Dorman* majority explicitly rejected earlier formulations focusing on the prosecutor's deliberate design or intent to suggest the accused's criminal propensity.[89] Instead, the *Dorman* majority urged the superiority of an "objective" standard focusing on the effects upon the jury of prior conviction impeachment.[90] Clearly, as several dissenting members pointed out, there was no basis in the prior law of local District of Columbia courts for such a standard.[91] The decision from which the majority "borrowed" its formulation did not deal with prior conviction impeachment.[92] Moreover, previous decisions had, over time, actually tightened the standard from one requiring that the prosecutor's questioning be "designed to suggest" the impermissible inference to one that could be "intended only to suggest" the defendant's criminal propensity.[93]

It is also likely, as several dissenters urged, that the majority's approach will somewhat impede the government's cross-examination regarding an accused's prior convictions.[94] But this was, in fact, the majority's aim. The majority's standard constitutes an improvement over prior legal developments in this area because it recognizes that an accused may be unfairly prejudiced not only when a prosecutor acts deliberately to suggest criminal propensity, but when he indirectly, through more subtle verbal shadings, accomplishes the same end. Where the resulting harms are similar, from a public policy standpoint, similar protection should be afforded. The majority's standard will not, however, substantially interfere with governmental cross-examination. Not all actions that in some way imply a defendant's

89. *Id.* at 460.

90. *Id.* at 460-61.

91. *See id.* at 471-74 (Gallagher, Nebeker & Kern, JJ., dissenting).

92. *Id.* at 474. *See* Brown v. United States, 383 A.2d 1082, 1085 (D.C. 1978) (dealing with prosecutorial comment on defendant's failure to testify).

93. *See* 491 A.2d at 471-75 (Gallagher, Nebeker & Kern JJ., dissenting). Even the most analogous line of cases, involving prosecutorial comment upon a defendant's prior convictions, had based a finding of error on the "conscious" attempts of the prosecutor to "invite" the jury to consider former convictions as evidence of the defendant's guilt. *See supra* note 70.

94. 491 A.2d at 474 (Gallagher, Nebeker & Kern, JJ., dissenting).

guilt will suffice to constitute error, but only those that "naturally and necessarily" imply the accused's guilt.

The majority's extension of *Fields* and *Bailey* constitutes its second major modification of prior law. In *Fields,* error was premised on the government's pairing of a question about the defendant's prior conviction for offenses similar to those charged with a question eliciting his clear denial of a key element of the crimes charged.[95] *Dorman* extended *Fields* to preclude impeachment in close proximity to an accused's denial of a rough equivalent of a key element of the charged offense.[96] In *Bailey,* error was predicated on the juxtaposition of prior conviction impeachment with a question that unequivocally asked the defendant whether he had committed the crime charged and that elicited a clear denial of guilt.[97] In *Dorman,* it was necessary for the court to characterize a question as constituting a summary of the appellant's account of the incident and to further imply that his affirmative response to the question was, "in effect," a general denial of guilt.[98] The majority thus extended *Bailey* to preclude the pairing of impeachment with questions eliciting only implied denials of guilt. Dual "implications," therefore, may now be sufficient to find the government's questioning in error: the juxtaposition of impeachment with a defendant's implied denial of guilt may enable the jury to necessarily conclude that the government's reference to prior conviction evidence implied the defendant's guilt for the offense charged. Again, the effect of the departure is to increase the protection available to the defendant against juror misapprehension of prior conviction evidence by limiting the circumstances under which the government may conduct its impeachment.

Finally, it is extremely difficult to reconcile the *Dorman* court's finding of error in the sequence of questions it examined with the *Baptist* court's failure to find error.[99] Appellants in both *Baptist* and *Dorman* had been charged with some form of petit larceny,[100] and both were impeached with convictions for crimes identical[101] to the offense with which they were charged. The higher risks of misuse of the prior conviction evidence were thus present

95. *Fields,* 396 A.2d at 526-27.

96. 491 A.2d at 463-64. *See supra* notes 75-78 and accompanying text.

97. *Bailey,* 447 A.2d at 781-83. *See supra* note 57 and accompanying text.

98. 491 A.2d at 464. *See supra* note 79 and accompanying text.

99. *See supra* notes 62-70 and accompanying text.

100. *Baptist,* 466 A.2d at 453 (attempted petit larceny); *Dorman,* 491 A.2d at 458 (petit larceny). Baptist had additionally been charged with attempted burglary. 466 A.2d at 453.

101. The appellant in *Dorman* was impeached with a crime identical to that charged except for the designation of the grade of the crime (attempted larceny). 491 A.2d at 463. Appellant in *Baptist* was impeached with a crime identical to one of those charged (attempted petit larceny). 466 A.2d at 458.

in the two cases.[102] In *Baptist,* the final question leading up to impeachment elicited the appellant's denial that he had "stack[ed] up" the boxes he allegedly attempted to purloin.[103] In *Dorman,* one of the final questions preceding impeachment elicited the appellant's denial he had "touched" the radio allegedly stolen.[104] In the former sequence, the court found no error because the question antecedent to impeachment related to the "circumstances surrounding the crime,"[105] but in the *Dorman* sequence, the court found a *Fields* violation because the appellant's denial that he had "touched" the radio was too similar to a denial of "taking" the radio, an element of the charged offense.[106] While the *Dorman* majority ostensibly approved the *Baptist* court's analysis,[107] it offered no explanation as to why marginal differences between "stack[ing]" and "touch[ing]" stolen property should yield contrary conclusions as to the permissibility of prior conviction questioning.[108] If the *Dorman* majority did not overrule *Baptist,*[109] as some dissenters urged, it nonetheless failed to provide the participants in a criminal trial with any clear indications as to how to proceed with, or when to object to, prior conviction questioning of this nature.

The overall impact of the above modifications to prior law will be to increase the likelihood that the government's prior conviction impeachment will be found to be error. The favorable net impact of the decision to the accused is, unfortunately, diminished by two further changes to prior law that will decrease the possibility that an error, once found, will warrant reversal of an appellant's conviction. First, the majority in *Dorman* explicity rejected prior law holding that an error of this genre was incurable by appropriate cautionary instructions.[110] Second, the majority's decision would allow unprecedented consideration to be given, in the weighing of an error, to the mitigating effects of the accused's exercise of his right to bring out his prior convictions on direct examination.[111] The decision may thus serve to undermine the already minimal protections afforded to the accused by cautionary instructions[112] and the exercise of his right to bring out and discuss

102. For a discussion of *Fields,* see *supra* notes 49-54, 59; *see also Bailey,* 447 A.2d at 782.

103. 466 A.2d at 458; *see also supra* notes 64-65 and accompanying text.

104. 491 A.2d at 463; *see also supra* note 77 and accompanying text.

105. 466 A.2d at 459.

106. 491 A.2d at 463-64.

107. *Id.* at 460 n.6.

108. *See id.* at 463-64. The *Dorman* court itself referred to the *Baptist* sequence as involving questioning related to the "handling" of the property at issue. *Id.* at 459 n.2.

109. *Id.* at 474 (Gallagher, Nebeker & Kern, JJ., dissenting).

110. *Id.* at 462 n.9. *See also supra* notes 53-54, 60, and accompanying text.

111. 491 A.2d at 463 n.10. *See supra* note 82.

112. *See supra* note 10 and accompanying text.

his former offenses.[113]

IV. CONCLUSION

In *Dorman v. United States,* the District of Columbia Court of Appeals was faced with a difficult task: to reduce the risks to the defendant created by the government's use of prior conviction evidence within the confines of a congressional policy mandating its admissibility.[114] Given the framework within which the court had to operate, it is not surprising that it met with only moderate success. The defendant stands a somewhat better chance than before of being protected against abuse of prior record evidence. However, admissibility rulings now seemingly rest upon minute factual variations in the government's cross-examination from case to case and upon the court's willingness to base a finding of impropriety on the subtle semantic shadings of the government's questions and the defendant's responses thereto.[115] Any benefits were achieved, therefore, at the expense of clarity and consistency. Henceforth, it will be more difficult for the government to know with any certainty when it is appropriate to use prior conviction evidence to test credibility.

The effect of *Dorman* will not, however, be to nullify section 14-305 of the District of Columbia Code, as some dissenters urged. Prior conviction evidence must continue to be admitted automatically regardless of its potential for prejudice and whether or not there is any logical nexus between the evidence and the defendant's capacity for truthfulness.[116] The *Dorman* court rightly recognized that it is the *introduction* of prior conviction evidence that is the source of the danger to the criminal defendant.[117] It is now time, as the author of the *Luck* opinion urged some twenty years ago, for the "legislature to face up" to the true problem at hand "rather than to remain content with cut-rate convictions gotten with the aid of prior criminal records."[118] The District of Columbia Council, in cooperation with Congress,[119] can restore principled decisionmaking to the District of Columbia courts by allowing discretion on the part of local trial judges to exclude prior conviction evidence where its probative value on the issue of credibility is not exceeded by its prejudicial effects to the accused. Efforts should be made

113. *See supra* note 82.

114. *Dorman,* 491 A.2d at 458.

115. *See supra* notes 77-79 and accompanying text.

116. 491 A.2d at 465-66 (Nebeker, J., dissenting).

117. *Id.* at 460.

118. Blakney v. United States, 397 F.2d 648, 649-50 (1968); *see also* United States v. Bailey, 426 F.2d 1236 (D.C. Cir. 1970).

119. *See supra* notes 35-36.

to fulfill a promise made long ago to bring the local court rules into conformity with those followed by the federal courts[120] and to thereby guarantee uniformity in the treatment of criminal defendants. Until such action is taken, prior conviction evidence will continue to have a ticket for admission in the District of Columbia courts. Sadly, it buys a very cheap seat.

Leslie Lawlor Hayes

120. *See supra* note 26.